

APPEAL NO. 032557
FILED NOVEMBER 17, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 3, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth and sixth quarters, and that the claimant is entitled to SIBs for the seventh quarter. The appellant (carrier) appealed the determination of entitlement to SIBs for the seventh quarter, arguing that it was error because there was another record which showed that the claimant was able to return to work. The claimant responded, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The carrier's position is that "[the hearing officer] noticed the existence of the other record but disagreed with it—which is not the legal test in a total inability to work SIBs case." The parties made several stipulations including the following: that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on September 28, 2000, with a 19% impairment rating; that the seventh quarter qualifying period began January 18 and ended April 18, 2003; and that the claimant did not make any job searches or earn any wages during the qualifying periods of the fifth, sixth, or seventh quarters.

The claimant seeks to show that he has made a good faith effort to obtain employment commensurate with his ability to work because he had a total inability to work. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The finding that the claimant provided a narrative report from a doctor that specifically explained how the injury caused a total inability to work during the seventh quarter qualifying period was not appealed.

The carrier contends that there are other records that show that the claimant is able to return to work, referencing an addendum report from Dr. B, a carrier-selected doctor, dated June 12, 2003, two months after the relevant qualifying period. In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002.

However, “[t]he mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this.” Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. The hearing officer specifically found that there was documented medical evidence that by the seventh quarter qualifying period, the claimant’s physical condition as a result of his compensable injury had deteriorated so that he was unable to work in any capacity. The evidence reflected that the claimant had a third spinal surgery on June 23, 2003, because of a failed fusion to the C6-C7 and posterior instrumentation of C5 through C7.

We have carefully reviewed the appealed determinations and the medical evidence on which the appeal is based and conclude that the hearing officer’s decision is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN MOTORISTS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge